

SERVED: March 30, 1993

NTSB Order No. EA-3830

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of March, 1993

JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11642
v.)	
)	
RONALD G. HAWES,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The Administrator has appealed from the Order Dismissing Stale Complaint issued by Chief Administrative Law Judge William E. Fowler, Jr. on March 15, 1991.¹ The Administrator argues that the dismissal was improper because the complaint presented an issue of lack of qualification, thus exempting it from the six-month notice requirement of our stale complaint rule (49 C.F.R.

¹ Attached is a copy of the law judge's Order Dismissing Stale Complaint.

821.33)². Respondent has not filed a reply brief. For the reasons discussed below, we deny the Administrator's appeal and affirm the law judge's order of dismissal.

The procedural history of this case is as follows. On December 27, 1990, the Administrator issued to respondent an order revoking his inspection authorization based on the following allegations:

1. You are now, and at all times mentioned herein were, the holder of Mechanic Certificate 1836871 with [i]nspection authorization.

² Section 821.33 provides, in pertinent part:

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

* * *

(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true. If not, the law judge shall proceed as in paragraph (a) of this section.

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing on the lack of qualification issue only, and he shall so inform the parties. The respondent shall be put on notice that he is to defend against lack of qualification and not merely against a proposed remedial sanction.

2. On or about November 2, 1989, you performed an annual inspection on, and approved for return to service, civil aircraft N2813R, a Cessna 182K.

3. In performing said inspection, you failed to determine whether said aircraft met all applicable airworthiness requirements, in that:

a. Said aircraft was not in compliance with Airworthiness Directive (AD) 83-13-01 (Amendment 39-4672), in that the fuel caps and their surrounding areas were severely corroded and the required placard had not been installed;

b. the pilot's control wheel was severely corroded; and

c. a Brackett inlet air filter had been installed without proper documentation.

4. On or about February 27, 1990, on the first flight of said aircraft following said inspection, said aircraft crashed due to engine failure.

It was further alleged that respondent had violated 14 C.F.R. 43.15(a) (failure to perform 100-hour inspection so as to properly determine whether the aircraft met all applicable airworthiness requirements), and 43.11(a) (failure to make maintenance entries showing compliance with Airworthiness Directives).

The Administrator filed the order of revocation as the complaint on January 17, 1991. On January 23, 1991, respondent filed his motion to dismiss the complaint as stale because the alleged violations occurred more than six months prior to the Administrator's advising respondent (by way of Notice of Proposed Certificate Action on July 9, 1990) of the charges. Thereafter, the Administrator amended his complaint by adding language which alleged that respondent lacked the degree of care, judgment, and

responsibility required of the holder of an inspection authorization. In his opposition to respondent's motion to dismiss, the Administrator asserted that the law judge was required by section 821.33(b) to determine whether an issue of lack of qualification would be presented if the allegations were assumed to be true and argued that, even absent the amendment, the allegations in the complaint presented such an issue.

In his order dismissing the complaint, the law judge cited Administrator v. Stewart, 2 NTSB 1140, 1143 n. 10 (1974), where we cautioned that we would look with disfavor upon any attempt to allege lack of qualification merely as a device to avoid dismissal of the complaint as stale, and concluded that in this case the Administrator had amended the complaint in order to avoid such a dismissal. The law judge held that the complaint did not specifically raise an issue of lack of qualification. We agree.

Our stale complaint rule requires the law judge to determine whether, assuming the allegations in the complaint are true, an issue of lack of qualification would be presented.³ If such an issue is presented, the 6-month notice requirement of the stale complaint rule does not apply.⁴ In our judgment, the allegations of the complaint in this case, even with the language added by the Administrator's amendment, do not raise an issue of lack of

³ Administrator v. Hoag, NTSB Order No. EA-3010 at 9 (1989), reconsideration denied, NTSB Order No. EA-3074 (1990).

⁴ Administrator v. Anderson, 5 NTSB 564, 566 (1985); Administrator v. Gaunce, 4 NTSB 53, 55 (1982).

qualification. We disagree with the Administrator's assertion that "where the sanction sought by the Administrator is revocation, the case of necessity involves a lack of qualification issue." (App. Br. at 6). If this were so, there would be no reason for the law judge to review all of the allegations of a complaint in order to determine whether an issue of lack of qualification is presented, as required by section 821.33(b).

The alleged deficiencies in respondent's inspection of the aircraft which crashed do not, in our view, warrant revocation.⁵

We think it is significant that the Administrator did not specifically allege (in either his original or amended complaint) that respondent's improper inspection was a cause of the subsequent crash. Although the Administrator states in his brief that the "mere structure of the complaint . . . suggests such a nexus," (App. Br. at 7, n. 3), we think that a more explicit causal connection was required, especially in light of the fact that the discrepancies noted (corroded fuel caps, corroded control wheel, and lack of required documentation) are not the sort normally associated with engine failure.

⁵ The Administrator cites two cases which he asserts are similar to this case, in which we found that the respondent lacked qualification. Administrator v. Hesse, 4 NTSB 1180 (1983), and Administrator v. Sayler, 2 NTSB 366 (1973). However, the respondents in both of those cases had prior violation histories, a factor which is absent in this case. As we noted in Sayler, at 367, in cases where the record does not disclose prior violations, a 60-day suspension of a mechanic's inspection authorization is the customary sanction for inadequate repair and inspection.

Finally, we note the Administrator's suggestion that he had an alternate basis under section 821.33(a) for avoiding dismissal of the complaint as stale in that there was good cause for the delay since the FAA was not aware of respondent's alleged violations until they were revealed by the investigation following the plane crash several months later. (App. Br. p. 7 n. 2.) However, because the Administrator did not present that argument to the law judge, he has waived his opportunity to pursue it on appeal.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's order dismissing the complaint is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.